IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CONTEMPT PETITION NO.130 OF 2006

IN

WRIT PETITION NO.1068 OF 2006

Mr Lalluram R. Gupta ...Petitioner

v/s

M/s Mohid Construction Co. and anr. ...Respondents

Mr S. Moholkar i/b Ms Jaya Nair for Petitioner.

Mr Ajay Misar for Respondents.

CORAM : D.K. DESHMUKH J.

DATE : 24TH JANUARY 2007.

P.C. :-

1. This petition has been filed by the petitioner claiming that the respondent Nos.5 and 6 in writ petition No.1068 of 2006 who are present respondent Nos.1 and 2 have wilfully disobeyed the order dated 13th July 2006 made by the Division Bench in writ petition No.1068 of 2006. Admitted position is that when that order was made by the Division Bench, the respondent Nos.5 and 6 were not present. It appears from the order that on 13th July 2006 itself, the Court issued Rule and heard the petition finally and made final order issuing directions against respondent Nos.5 and 6. Rule 637 of the Bombay High Court (O.S.) Rules reads as under :-

> "637. The Court may either summarily dismiss the petition or order a rule nisi to be issued against the respondent, as it thinks fit. Any rule so granted shall be made returnable on such day as the Court may direct, but ordinarily it shall not be made returnable within less than fourteen days after service thereof on the respondent."

2. Perusal of the above quoted Rule 637 makes it clear that when a petition comes before the court after it is filed by the Petitioner in court, the court has two options, the court can either dismiss the petition summarily or may issue rule-nisi. When the court issues rule-nisi it calls upon the Respondent to show cause why relief claimed by the Petitioner in his/its favour should not be granted against the Respondent in the petition. Rule 641 lays down that after rule nisi is issued by the court, a copy of the order made by the court thereon shall be served on the Respondent in the manner prescribed for the service of writ of summons upon a defendant in a suit. Rule 642 lays down that an answer to the petition which is served on the Respondent shall be made by filing affidavit in reply and serving a copy thereof on the Petitioner or his advocate atleast 4 days before the date on which rule has been made returnable. It is only thereafter that the court can hear the petition finally and make a final order. In cases where all the parties in the petition appear before the court either voluntarily or because the Petitioner has served a notice on them, the court can if the parties give their consent issue rule and make it returnable on the same day and hear the parties finally. Therefore, it is apparent without issuing rule in the petition and service of that rule on the Respondent

against whom relief is claimed in the petition, the court cannot make final order in the petition. Therefore, in a situation where it appears to the court that the Petitioner is entitled to the relief claimed by him and the court finds that the Respondents against whom relief is claimed by the Petitioner are not present before the court, then the only option available to the court is to issue rule in the petition requiring the Petitioner to serve that rule on the Respondents against whom he is seeking final order. It is only after rule is served on the Respondents that the court can make a final order, in case those Respondents are appearing after hearing them and if those Respondents are not appearing then even without hearing them. But in no case the court gets jurisdiction to make final order against any Respondent who has not been served with rule nisi issued by the court. The Rules have been framed by the court in order to comply with the requirements of natural justice and the Supreme Court in its judgment in the case of Nawabkhan Abbaskhan v/s. State of Gujarat, AIR 1974 SC 1471 has clearly laid it down as a law that where the principles of natural justice are incorporated in a statute and an order is made in breach of that principles that order is a null and void order. The observations of the Supreme Court in paragraph 20 of the judgment are relevant. They read as under:-

20. We express no final opinion on the many wide-ranging problems in public law of illegal orders and violations thereof by citizens, grave though some of them may be. But we do hold that an order which is void may be directly and collaterally challenged in legal proceedings. An order is null and void if the statute clothing the administrative tribunal with power conditions it with the obligation to hear, expressly or by implication. Beyond doubt, an order which infringes a fundamental freedom passed in violation of the audi alteram partem rule is a nullity. When a competent Court holds such official act or order invalid, or sets it aside, it operates from nativity i.e. the impugned act or order was never valid. The French Jurists call it L'inexistence or outlawed order (p.127 Brown and Garner, French Administrative Law) and could not found the ground for a prosecution. On this limited ratio the appellant is entitled to an acquittal. We allow this appeal.

3. The Rules framed by this court have statutory force. Rules have been framed by this court for issuance of service of rule-nisi to comply with the requirements of natural justice and if the court makes an order without following those Rules, the order would be a nullity in the eyes of law.

4. The learned counsel appearing for petitioner relied on a judgment of the learned Single Judge of this Court in the case of Shaheda Sarwar Khan v/s Sarwar Ahmed Rauf Khan and others, reported in 1999(1) MLJ 31, to state that the Court hearing contempt petition cannot go into the merits of the matter, cannot decide correctness, legality or illegality of the order. In my opinion, it is true that the Court deciding contempt petition cannot go into the correctness, legality or illegality of the order but if the Court hearing contempt petition finds that the order has been made in violation of principles of natural justice as incorporated in the Rules and therefore in nullity of law, surely the Court hearing contempt petition can decline to entertain contempt petition, otherwise it will amount punishing persons against whom final order is made by the Court without granting them an opportunity of being heard before the final order is made against them. In my opinion, considering the nature of the jurisdiction of the

contempt Court, it would be inappropriate to initiate contempt proceedings against such party. Petition is therefore disposed off with no order as to costs.

. Parties to act on the copy of this order duly authenticated by the Associate / Private Secretary as true copy.

. Certified copy expedited.